Jetera Sdn Bhd v Maju Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–861 OF 2004
ABDUL MALIK ISHAK J
6 JANUARY 2006

Civil Procedure — Summary judgment — Setting aside — Whether triable issues raised — Claims for outstanding amount due and owing by defendant for all sub-contract works done and completed — Defendant never issued final statement of account and yet to issue the same since defendant was waiting for relevant confirmation from employer of project — Whether reasons for delay of issuance of final statement of account constituted 'circumstances of the case' which were real and valid

The plaintiff was a sub-contractor for RC work, brickwork, plastering, screeding and perimeter drain ('the sub-contract works') in relation to a project ('the said project') appointed by the defendant who is the main contractor of the said project. The plaintiff claimed for the sum of RM3,017,587.15 being the outstanding amount due and owing by the defendant for all the sub-contract works done and completed by the plaintiff and this would include the sum of RM435,161.64 being the retention monies and the sum of RM348,129.31 being the so called unauthorised deduction by the defendant. This was an appeal by the defendant to the judge in chambers against the decision of the learned senior assistant registrar ('SAR') who allowed the plaintiff's application for summary judgment pursuant to O 14 of the Rules of the High Court 1980.

Held, allowing the appeal:

(1) As the main contractor, the defendant had never issued any final statement of account and had yet to issue the same since the defendant was waiting for the relevant confirmation from the Jabatan Kerja Raya ('JKR') being the employer of the said project. The plaintiff relied heavily on its own final account statements which were regarded as a mere proposal for the defendant's approval (see para 6).

(2) The defendant's progress payment certificate which had been taken as one of the basis of the plaintiff's claim against the defendant herein was merely provisional subject to final confirmation from the final statement of account and it shall never be regarded as final and conclusive. Consequently, the plaintiff's claim should be regarded as premature and baseless (see paras 7, 9).

(3) The defendant's reason for the delay of the issuance of the final statement of account of the said project was that it was a normal practice in a construction industry that the main contractor of a project must obtain the proper information from the employer that the defects found on site during the defect liability period had been rectified accordingly. The plaintiff had acknowledged

that there were a few rectification works to be done due to the complaints made by the JKR in regard to the defects discovered during the defect liability period. The defendant highlighted that the JKR had yet to issue the relevant confirmation pertaining to the rectification works in the form of a certificate known as the certificate of making good defects ('CMGD'). Without the CMGD, the defendant was not in a position to issue the final statement of account (see para 12).

(4) The reasons for the delay of the issuance of the final statement of account constituted the 'circumstances of the case' which were real and valid and the court must consider them favourably for the benefit of the defendant and they constituted triable issues. The defendant had shown valid reasons for the delay in issuing the final statement of account (see para 15).

(5) The plaintiff alluded to the sum of RM348,129.31 and claimed that that sum constituted the 'unauthorised deduction' made by the defendant contrary to the contractual provisions as set out in the letter of award. But, unfortunately, the plaintiff had failed to specify the details of the so called 'unauthorised deduction' and the plaintiff too had failed to produce any documentary evidence to support the allegation of an 'unauthorised deduction' by the defendant. At any rate, the defendant had categorically denied that there was ever an 'unauthorised deduction'. This ambiguity constituted a triable issue which warranted a full trial (see para 20).

[Bahasa Malaysia summary

Plaintif adalah sub-kontraktor untuk kerja RC, kerja batu-bata, kerja plaster, kerja melepa dan kerja mengukur parit ('kerja-kerja sub-kontrak') berkaitan satu projek ('projek tersebut') yang dilantik oleh defendan iaitu kontraktor utama projek tersebut. Plaintif menuntut sejumlah RM3,017,587.15 yang merupakan baki jumlah yang perlu dibayar oleh defendan untuk semua kerja-kerja sub-kontrak yang telah dilaksanakan dan disiapkan oleh plaintif dan ini termasuklah sejumlah RM435,161.64 iaitu wang yang ditahan dan jumlah RM348,129.31 iaitu potongan yang tidak dibenarkan oleh defendan. Ini adalah rayuan oleh defendan kepada hakim dalam kamar terhadap keputusan penolong kanan pendaftar ('PKP') yang membenarkan permohonan plaintif untuk penghakiman terus menurut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980.]

Diputuskan, membenarkan rayuan tersebut:

(1) Sebagai kontraktor utama, defendan tidak pernah mengeluarkan apa-apa penyata akaun terakhir dan belum mengeluarkan yang sama memandangkan defendan sedang menunggu pengesahan berkaitan daripada Jabatan Kerja Raya ('JKR') yang merupakan majikan projek tersebut. Plaintif bergantung kepada penyata akaun terakhirnya yang dianggap sebagai cadangan untuk kelulusan defendan (lihat perenggan 6).

(2) Sijil bayaran ansuran defendan yang telah diambil sebagai salah satu daripada asas tuntutan plaintif terhadap defendan hanya sementara tertakluk kepada pengesahan dari penyata akaun terakhir dan ia tidak patut dianggap sebagai muktamad dan konklusif. Berikutan itu, tuntutan plaintif hendaklah dianggap sebagai pra matang dan tidak berasas (lihat perenggan 7, 9).

(3) Alasan plaintif untuk kelewatan pengeluaran penyata akaun terakhir projek tersebut adalah bahawa ia adalah amalan biasa dalam industri pembinaan bahawa kontraktor utama suatu projek hendaklah mendapatkan maklumat betul daripada majikan bahawa kecacatan yang ditemui di tapak projek semasa tempoh liabiliti kecacatan telah diperbaiki dengan sewajarnya. Plaintif mengetahui tentang kerja-kerja pembaikan yang perlu dilakukan berdasarkan aduan yang dibuat oleh JKR berhubung kecacatan yang ditemui semasa tempoh liabiliti kecacatan itu. Defendan telah mengutarakan bahawa JKR masih belum mengeluarkan pengesahan berkaitan tentang kerja-kerja pembaikan dalam bentuk sijil yang dikenali sebagai sijil memperbaiki kecacatan ('CMGD'). Tanpa CMGD ini, defendan bukan dalam kedudukan untuk mengeluarkan penyata akaun terakhir (lihat perenggan 12).

(4) Alasan kelewatan mengeluarkan penyata akaun terakhir membentuk 'circumstances of the case' yang mana adalah benar dan sah dan mahkamah hendaklah menimbangkan dengan teliti untuk manfaat defendan dan ia membentuk persoalan yang perlu dibicarakan. Defendan telah menunjukkan alasan sah untuk kelewatan dalam mengeluarkan akaun penyata terakhir itu (lihat perenggan 15).

(5) Plaintif menyebut tentang jumlah RM348,129.31 dan mengatakan bahawa jumlah tersebut membentuk 'unauthorised deduction' yang dibuat oleh defendan bertentangan dengan peruntukan kontraktual yang terkandung dalam surat award. Namun, plaintif telah gagal untuk menyatakan butiran 'unauthorised deduction' tersebut dan plaintif juga gagal untuk mengemukakan apa-apa keterangan dokumentar untuk menyokong pengataan 'unauthorised deduction' oleh defendan. Bagaimanapun, defendan telah menafikan bahawa terdapat apa-apa 'unauthorised deduction'. Ketaksaan ini membentuk persoalan yang perlu dibicarakan dalam perbicaraan penuh (lihat perenggan 20).

Notes

For cases on setting aside of summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6500–6507.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

British and Commonwealth Holdings plc v Quandrex Holdings Inc [1989] 1 QB 842; [1989] 3 All ER 492 (refd)

European Partners in Capital (EPIC) Holdings BV v Goddard and Smith (1992) 41 EG 118 (refd)

Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd [1992] 2 MLJ 137 (refd)
Harrison v Bottenheim (1872) 26 WR 362 (refd)
Kim Seng Hotel and Coffee Shop v Chuah Teong Buan [1971] 1 MLJ 233 (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)
Neale v Richardson [1938] 1 All ER 753 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
SM Appaduray & Anor v R Ananda [1982] 1 MLJ 292 (refd)
Standard Chartered Bank Malaysia Bhd v Eng Song Huat [1996] 1 MLJ 446 (refd)
Tharsis Sulphur And Copper Company, The v M'Elroy & Sons & Ors (1878) 3 App Cas 1040 (refd)
Three Rivers District Council & Ors v Bank of England (No 3) [2001] 2 All ER 513 (refd)
Town House Hotel Ltd v Shanghai Hall Ltd [1966] 2 MLJ 169 (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)

Legislation referred to
Rules of the High Court 1980 O 14

Oon Chee Kheng (CK Oon & Co) for the plaintiff.
Tengku Naufal Tengku Mansor (Tengku Naufal & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This was an appeal by the defendant to the judge in chambers in encl 10 against the decision of the learned senior assistant registrar ('SAR') who allowed the plaintiff's application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('RHC'). The SAR allowed the plaintiff's application for summary judgment for:

(a) the sum of RM3,017,587.15;

(b) with interest at the rate of 8%pa on the sum of RM3,017,587.15 from the date of the order till the date of full realisation; and

(c) costs.

[2] The courts are invested with extensive powers to allow or disallow summary judgment under O 14. The summary judgment procedure as set out in the RHC applies to every action begun by writ. It is not appropriate in cases which involve lengthy arguments by counsel on difficult questions of law and fact (*United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Or* [1983] 1 MLJ 206 (FC); and *British and Commonwealth Holdings plc v Quandrex Holdings Inc* [1989] 1 QB 842; [1989] 3 All ER 492 (CA)). It will not be allowed when there is a bona fide triable issue to be determined (*Kim Seng Hotel and Coffee Shop v Chuah*

Teong Buan [1971] 1 MLJ 233 (FC); and *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC)), and where the alleged facts would allow the defendant to interrogate the plaintiff (*Harrison v Bottenheim* (1872) 26 WR 362 (CA)). It will also not be allowed in a situation where there are disputes arising out of conflicting professional opinions based on certain reports (*European Partners in Capital (EPIC) Holdings BV v Goddard and Smith* (1992) 41 EG 118 (CA)). It would be difficult in the extreme to list down what would not be allowed in an O 14 application. The list will never be closed and it will be at large.

BRIEF FACTS OF THE CASE

[3] The plaintiff is a sub-contractor for RC work, brickwork, plastering, screeding and perimeter drain ('the sub-contract works') in relation to a project known as Cadangan Membina Kolej Matrikulasi Perak Di Atas Sebahagian Dari Lot 137664, Mukim Teja, Daerah Kinta Untuk Kementerian Pendidikan Malaysia ('the said project') appointed by the defendant who is the main contractor of the said project by virtue of a letter of award dated 14 May 2001 as reflected in exh 'TBT-1' of encl 5.

[4] The plaintiff claimed for the sum of RM3,017,587.15 being the outstanding amount due and owing by the defendant for all the sub-contract works done and completed by the plaintiff and this would include the sum of RM435,161.64 being the retention monies and the sum of RM348,129.31 being the so called unauthorised deduction by the defendant.

DECISION OF THE COURT

[5] Since there were bona fide triable issues, I allowed the defendant's appeal in encl 10 with costs. I will now set out the reasons for arriving at that decision.

The amounts stated under the plaintiff's own 'final account' statements were disputed

[6] As the main contractor, the defendant has never issued any final statement of account and has yet to issue the same since the defendant was waiting for the relevant confirmation from the Jabatan Kerja Raya ('JKR') being the employer of the said project. The plaintiff relied heavily on its own final account statements which were regarded as a mere proposal for the defendant's approval. That this was the situation at hand can readily be confirmed by looking at the plaintiff's own averment as reflected at para 9 of encl 5.

The defendant's progress payment certificates shall not be regarded as final

[7] The plaintiff highlighted and placed emphasis on the defendant's progress payment certificates numbers 12(a) and 12(d) which were exhibited as exh 'TBT-8' of encl 5 wherein it stated that the revised sub-contract sum shall be RM17,406,465.49. But the plaintiff has overlooked one salient point. The same progress payment certificates numbers 12(a) and 12(d) contained a clause which stated that the sum of RM17,406,465.49 shall not be taken as conclusive and final

amount which would form the basis of the plaintiff's claim against the defendant. Consequently, the plaintiff's claim should be regarded as premature and baseless.

[8] It would be ideal, at this juncture, to explain the legal status of an interim certificate and/or a progress payment certificate in the context of a building construction contract. For this exercise, I should refer to *Halsbury's Laws of Malaysia* (Vol 3, 1999 Ed) at p 69 where it states that:

> *Interim certificates* The purpose of an interim certificate is to provide for payments on account, for example by reference to the value of the works or by stage payments of fixed or variable sums. Most contracts expressly provide that sums paid on interim certificates will be subject to adjustments on the issuing of the final certificate (*Ling Heng Toh Co v Borneo Development Corpn Sdn Bhd* [1973] 1 MLJ 23, FC) but interim payments have always been regarded as subject to such adjustments (*Lamprell v Billericay Union* (1849) 3 Exch 283 at p 305 per Rolfe B; *Tharsis Sulphur and Copper Co v M'Elroy & Sons* (1878) 3 App Cass 1040 at pp 1048–1049, HL per Lord Hatherley LC). An interim certificate will not be taken as an approval of the work (*Cooper v Uttoxeter Burial Board* (1864) 11 LT 565; *Tripp v Armitage* (1839) 4 M&W 687; and *Richardson v Mahon* (1879) 4 LR Jr 486). In general, an interim certificate creates a debt in favour of the contractor which the employer must pay at once (*Pickering v Ilfracombe Rly Co* (1868) LR 3 CP 235), but subject to the terms of their agreement (*Peter Leung Construction Co Ltd v Tai Poon Co Ltd* (1985) 1 HKC 285, CA (Hk)) as well as any set-off (*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, SC). Where however the contract provides that payment shall not be legally due until completion but that advances may be made against certificates, the contractor has no right of action before completion.

[9] I must reiterate that the defendant's progress payment certificate number 12(d) which has been taken as one of the basis of the plaintiff's claim against the defendant herein was merely provisional subject to final confirmation from the final statement of account and it shall never be regarded as final and conclusive. Even if the defendant has agreed to the sum of RM11,300,000 to be paid to the plaintiff based on the relevant progress payment certificates issued earlier, the plaintiff as the sub-contractor to the said project should not take those payments as waivers of the defendant's other contractual rights against the plaintiff in the context of deducting and/or claiming against the plaintiff for any costs incurred in rectifying the defects of the said project which was currently pending confirmation and approval from the JKR — the employer of the said project. Lord Hatherley writing a separate judgment in the case of *The Tharsis Sulphur And Copper Company v M'Elroy & Sons & Ors* (1878) 3 App Cas 1040, had this to say (see p 1048):

> Now, my Lords, the function of a certificate of this kind, which is not by any means an uncommon instrument, is this. The engineer of the company is expected by the company to inform them whether they have sufficient value on their premises in the course of the execution of the contract, either in goods or materials supplied, or in the cost of working up those materials, which of course, renders them more valuable, whether there is sufficient in either of those forms to justify an advance. The certificate is not sent in as a bill for payment, there is no such bill at that time. The bill for payment is provided for in this agreement, as in most agreements of this kind which I have seen. The bill for payments is to be of the amount of £25,000, when all the work is done, subject to deductions. If extra work has been ordered the extra work will be added in a separate bill, and paid for by a separate payment. But when the company want to know whether or not they are in a

A condition to make an advance, they ask the engineer, what value have you got in the shape of materials or work, and can we make the advance?

[10] And continuing at p 1049, Lord Hatherley aptly said:

B It is not an exact sum made up by calculation of items, and by applying the prices to the quantities of articles supplied under those items — it is really simply nothing but this — it is an account sent in to shew that the company are quite safe in making such payment as they may think proper by way of advance, because there is now upon their ground property of such a value. As regards the iron, of course they had under that contract a peculiar stipulation, which I agree is an unusual one, and one which I have not seen before C in other contracts, that they must always keep twenty-five tons of iron in hand in the form of castings before making any advance, and that at the end of the contract they would hand over to the respondents the value of twenty-five tons of castings.

[11] Without a doubt, these salient passages certainly assisted me in adjudicating D the present appeal at hand.

The final statement of account has yet to be issued by the defendant

[12] The defendant gave the reason for the delay of the issuance of the final E statement of account of the said project. It was this. That it was and it is a normal practice in a construction industry that the main contractor of a project must obtain the proper information from the employer that the defects found on site during the defect liability period have been rectified accordingly. The plaintiff has through its own statements in paras 7 and 8 of encl 5 acknowledged that there were a few rectification works to be done due to the complaints made by the JKR in regard to F the defects discovered during the defect liability period. In para 6 of encl 8, the defendant highlighted that the JKR has yet to issue the relevant confirmation pertaining to the rectification works in the form of a certificate known as the certificate of making good defects ('CMGD'). Without the CMGD, the defendant was not in a position to issue the final statement of account.

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[13] The responsibility for the issuance of the final statement of account, which has yet to be issued till to-date, must surely rest with the defendant. It must be recalled to mind that the contract entered into by the parties herein concerned a non-PAM building contract. Consequently, there was no involvement of any architect or any engineer or any other person in approving the works done up to the standard H required by the JKR as the employer. It may be argued that where the contract provides that the work is to be carried out to the satisfaction or approval of the employer himself, the approval or satisfaction should not be unreasonably withheld. Indeed in *Halsbury's Laws of Malaysia* (Vol 3, 1999 Ed) at p 64, the following passage appears:

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Implication of reasonableness Where the contract provides that the work is to be carried out to the satisfaction or approval of the employer himself, the courts will generally imply that such satisfaction or approval is not to be unreasonably withheld (*Dallman v King* (1837) 4 Bing NC 105, DC(Eng); *Parsons v Sexton* (1847) 4 CB 899; *Smith v Sadler* (1880) 6 VLR 5; *Docker v Hyams* [1969] 3 All ER 808; [1969] 1 WLR 1060, CA (Eng)), but where it appears

from the tenor of the agreement that one party is entitled to withhold approval or satisfaction without reasonable grounds, such an implication will be precluded (*Stadhard v Lee* (1863) 3 B&S 364; *Viscount Tredegar v Harwood* [1929] AC 72, HL). Whether an employer has reasonable grounds for withholding approval will depend on the circumstances of the case. Sometimes, the contract provides for work to be done to the satisfaction of the employer or the architect. It will be implied that neither could unreasonably refuse to express satisfaction (*Parsons v Sexton* (1847) 4 CB 899; and *Andrews v Belfield* (1857) 2 CBNS 779).

[14] And I gratefully adopt this passage to the present appeal at hand.

[15] The defendant has always maintained, both in the Statement of Defence and in the affidavit in reply, that the final statement of account of the said project has yet to be finalised and issued by the defendant with the approval of the JKR as the employer of the said project. The reasons for the delay of the issuance of the final statement of account constituted the 'circumstances of the case' which were real and valid and this court must surely consider them favourably for the benefit of the defendant and they constituted triable issues. The case of *Neale v Richardson* [1938] 1 All ER 753 cited by the plaintiff should be distinguished. There, the facts showed that the inordinate delay by the architect was without justifiable cause and reason. Here, the defendant has shown valid reasons for the delay in issuing the final statement of account.

The retention sum shall only be released upon issuance of the CMGD by the JKR

[16] I must refer to cl 8.2 of the letter of award dated 14 May 2001 as seen in exh 'TBT-1' of encl 5 which formed one of the parties contractual obligations in regard to the retention sum. That clause states as follows:

The retention money shall be released to you in two moieties. The 1st moiety shall become due and payable upon issuance of the Certificate of Practical Completion by the client. The second moiety shall be released after the expiry of the defect liability period and or made good defect which ever is the later.

[17] It meant that the retention sum being part of the whole amount claimed by the plaintiff shall not be released until a proper CMGD has been issued by the JKR and that would be the basis of the defendant's right to deduct or off set the retention sum, if any.

The defendant has a contractual right to deduct from the retention money

[18] Clause 14.0 of the letter of award dated 14 May 2001 as seen in exh 'TBT-1' of encl 5 must now be referred to. There it states as follows:

Maju Holdings Sdn Bhd shall notwithstanding anything in this contract be entitled to deduct from or set-off against any monies due to the contractor (including retention money) any sum or sums which the contractor is liable to pay to Maju Holdings Sdn Bhd under this contract.

[19] Flowing from this, a question may be posed. It is in this phraseology. How would the defendant be expected to release the money — referring to the retention sum, if the fact clearly showed that there were defects discovered and duly rectified but has yet to be approved and confirmed by the employer — referring to JKR? There would be a possibility nay a probability that the defendant would be denied of its contractual right to rightfully deduct and/or set-off whatever money from the retention sum if the whole of the retention sum was released to the plaintiff. Again, that would constitute a triable issue.

The amount of RM348,129.31 claimed as 'unauthorised deduction'

[20] As para 15A of the amended statement of claim as per encl 4 and at para 18 of encl 5, the plaintiff alluded to the sum of RM348,129.31 and claimed that that sum constituted the 'unauthorised deduction' made by the defendant contrary to the contractual provisions as set out in the letter of award. But, unfortunately, the plaintiff has failed to specify the details of the so called 'unauthorised deduction' and the plaintiff too has failed to produce any documentary evidence to support the allegation of an 'unauthorised deduction' by the defendant. At any rate, the defendant has categorically denied that there was ever an 'unauthorised deduction'. Without a doubt, this ambiguity constituted a triable issue which warranted a full trial.

The final amount payable to the plaintiff could only be determined upon issuance of the final account by the defendant

[21] This point was emphasised by the defendant in order to show to this court that this point constituted a triable issue. It was pointed out that according to the standard practice of the construction industry, the final amount payable to the sub-contractors shall only be determined upon issuance of the final account by the main contractor. In the context of the present appeal, the main contractor would refer to the defendant. However, the defendant cannot simply issue any sort of account without taking into consideration its contractual rights to claim and/or to deduct from any amount held by the defendant as security for the sub-contractor's performance. There were other companies who were appointed as sub-contractors to the said project by the defendant. The ultimate intention of the defendant was to fulfill its contractual obligations with its employer — referring to the JKR. Now, having said all these, the defendant was not denying that it had a subsisting contractual obligations to not only the plaintiff but also to the other sub-contractors. The defendant knew that it had to pay for the works that had been done and for services that had been rendered by the sub-contractors including the plaintiff. But the defendant emphasised that the plaintiff too had to honour its contractual obligations under the letter of award.

The legal semantics

[22] I have said earlier that it would be difficult to list down the situations where an O 14 would not apply. The present appeal would fall under the category where

an O 14 would be inappropriate. An O 14 too would be inappropriate where a guarantor successfully challenges the service of the notice of demand on the grounds that it was sent to an address different from that as stated in the guarantee document (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, CA; and *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446). It would also be inappropriate where the aggrieved party challenges the sufficiency or validity of a notice of termination of a tenancy agreement (*Town House Hotel Ltd v Shanghai Hall Ltd* [1966] 2 MLJ 169). If the collateral agreement contradicts the main agreement (*Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd* [1992] 2 MLJ 137, SC) and where the accuracy of a survey pertaining to a land enroachment action is disputed (*SM Appaduray & Anor v R Ananda* [1982] 1 MLJ 292) then the courts would be reluctant to grant an O 14 application. Only one triable issue would be sufficient to deny the plaintiff its O 14 application (*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC). Here, the defendant has succeeded in raising several triable issues as alluded to earlier. The complexity of the case called for a trial of the action and this was what had transpired in this appeal. Borrowing the words of Lord Hope of Craighead in the case of *Three Rivers District Council & Ors v Bank of England (No 3)* [2001] 2 All ER 513 at pp 542–543, I must decide the present appeal in favour of the defendant. This was what Lord Hope of Craighead said in that case:

> (6) WHETHER THE CLAIM SHOULD BE SUMMARILY STRUCK OUT
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> (94) For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is — what is to be the scope of that inquiry?
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> (95) I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be (sic) take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in *Swain's case [2001] 1 All ER 91* at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

[23] I may venture to add that the complexity of the case could be used as a yardstick to determine whether the court should grant an O 14 application. Once the

court has determined that the case is complex, an O 14 application would be denied and the case would proceed for trial.

CONCLUSION

[24] I reiterate that I allowed the defendant's appeal in encl 10 with costs.

Appeal allowed.

Reported by Peter Ling